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7 Attorneys for the United States of America

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR0992-H
	)	
11 Plaintiff,	)	DATE: August 25, 2008
	)	TIME: 2:00 p.m.
12 v.	)	
	)	
13 RUBEN RODRIGUEZ,	)	
	)	GOVERNMENT'S RESPONSE AND
14	)	OPPOSITION TO DEFENDANT'S
15	)	MOTIONS:
	)	
16 Defendant.	)	(1) TO DISMISS INDICTMENT
	)	
17	)	TOGETHER WITH STATEMENT OF FACTS,
	)	MEMORANDUM OF POINTS AND
18	)	AUTHORITIES

19 The United States of America, by its counsel, Karen P. Hewitt,  
20 United States Attorney, and Paul S. Cook, Assistant United States  
21 Attorney, hereby responds to and opposes Defendants' above-captioned  
22 Motions. This response and opposition is based upon the files and  
23 records of the case, together with the attached statement of facts and  
24 memorandum of points and authorities. On May 6, 2008, the Government  
25 responded to Defendant's Discovery Motion and filed its motion for  
26 reciprocal discovery and fingerprint exemplars.  
27  
28

## I

**STATEMENT OF FACTS**

On Thursday, March 13, 2008 at 7:08 p.m., Defendant made application for admission into the United States from Mexico at the pedestrian lanes at San Ysidro, California Port of Entry (POE). He falsely claimed he was a United States citizen going to San Diego. He did not present any immigration or identification documents to the CBP Officer, but maintained that he was an American citizen. Defendant was escorted to the secondary area where a check of his fingerprints revealed that he was a deported alien who had been administratively removed from the United States on July 31, 1998, January 10, 2002, and December 8, 2005. Defendant invoked his right to remain silent.

Defendant was most recently ordered deported by an Immigration Judge in Tacoma, Washington, on March 6, 2008. Defendant has prior immigration convictions for two counts of 8 U.S.C. § 1325 in 1999, and one count of 8 U.S.C. § 1326 in 2003, both in the District of Oregon. Defendant also has convictions in 1995 for Attempted Burglary; 1996 for Larceny; 1998 for Theft II; 1999 for DUI; 1999 for False Information to Police; 1999 for Theft II; and 2002 for Theft III.

## II

**THE INDICTMENT IS SUFFICIENT**

Defendant argues that the indictment is defective in that it does not allege a specific deportation date or a temporal relationship of his removal to his prior felony conviction. Quite to the contrary, the Indictment alleges that the defendant "was removed from the United States subsequent to June 17, 2003." This date is subsequent to his felony convictions and prior to his "attempted entry" date of March

1 13, 2008, as charged in the Indictment. This complies with the  
2 requirements of United States v. Covian-Sandoval, 462 F.3d 1090,  
3 1096-98 (9th Cir.2006), [holding that the *fact* of a prior conviction  
4 need not have been submitted to the jury, but the date of a prior  
5 removal (necessary to determine whether the removal had followed the  
6 conviction in time) must be admitted by the defendant or found by a  
7 jury]. See U.S. v. Salazar-Lopez, 506 F.3d 748 (9<sup>th</sup> Cir. 2007) (fact  
8 that defendant had been removed after his conviction, should have been  
9 alleged in the indictment and proved to the jury). Indeed, the Ninth  
10 Circuit recently held that a district court did not err by permitting  
11 the government to introduce evidence that defendant had been deported  
12 on two separate occasions where the evidence of each deportation was  
13 dissimilar, saying: "The government was entitled to introduce evidence  
14 of both deportations to hedge the risk that the jury may reject the  
15 offered proof of one deportation, but not the other." United States  
16 v. Martinez-Rodriguez, 472 F.3d 1087 (9th Cir. 2007).

17 All of Defendant's convictions were prior to the June 17, 2003  
18 date alleged in the Indictment and he has two removals, December 8,  
19 2005, and March 6, 2008, which are subsequent to this date. The  
20 Indictment is sufficient and Defendant's motion to dismiss should be  
21 denied.

22 Date: August 18, 2008.

23 Respectfully submitted,

24 KAREN P. HEWITT  
25 United States Attorney

26 s/Paul S. Cook  
27 PAUL S. COOK  
28 Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 08cr0992-H  
)  
Plaintiff, )  
)  
v. )  
) CERTIFICATE OF SERVICE  
)  
RUBEN RODRIGUEZ, )  
)  
Defendant. )  
\_\_\_\_\_ )

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Victor Pippins

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2008.

s/Paul S. Cook

PAUL S. COOK